

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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PARASYS, INC.,

Employer,

- and -

Case No. 2-RD-1589

JULIA ODLE, An Individual,

Petitioner,

- and -

**UNITED FEDERATION OF SPECIAL POLICE
AND SECURITY OFFICERS, INC., LOCAL 639,**

Intervenor,

- and -

FEDERAL CONTRACT GUARDS OF AMERICA,

Intervenor.

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**PETITIONER'S ANSWERING BRIEF OPPOSING LOCAL 639'S
EXCEPTIONS TO THE ALJ'S DECISION ON OBJECTIONS**

PRELIMINARY STATEMENT

Petitioner Julia Odle, by her attorneys, Gladstein, Reif & Meginniss, LLP, submits this answering brief opposing the exceptions to Administrative Law Judge ("ALJ") Raymond Green's Decision on Objections filed by United Federation of Special Police and Security Officers, Inc., Local 639 ("Local 639"), and supporting the ALJ's findings, conclusions, and recommendation that: (1) the objections to the election have no merit and should be dismissed; and (2) the case be

remanded to the Regional Director for the purpose of issuing the appropriate Certification of Results.

Pursuant to a Decision and Direction of Election issued by the Regional Director on June 16, 2010¹, an election was conducted on July 19 and July 20 in a unit of full-time and regular part-time security officers, including sergeants, employed by Parasys, Inc. (“the Employer”). The tally of ballots showed that of 85 eligible voters, 51 votes were cast against both participating unions, 17 votes were cast for Local 639, 0 votes were cast for Federal Contract Guards of America (“FCGOA”), and there was 1 challenged ballot. Local 639 filed two objections to the election and FCGOA filed four objections. The Regional Director directed that a hearing be held on Local 639’s Objection 2 and FCGOA’s Objection 1.² On September 13, the ALJ conducted a hearing on these objections. On October 4, the ALJ issued his Decision on Objections (“ALJD”). On or about October 19, Local 639 filed exceptions to the ALJD.

The Board should overrule all of Local 639’s exceptions, as the credible evidence fully supports the ALJ’s findings that the single incident at issue took place in the presence of only one employee, and that news of this incident was not disseminated to any other employees.

STATEMENT OF FACTS

On July 14, representatives of Local 639 (Hector Fajardo and Shaun Brennan), FCGOA (Guy James and Nicholas Dippolito), and SEIU Local 32BJ (Alvin Carter and Katie Miles) went

¹ All dates are in 2010.

² The objecting unions withdrew their other objections.

to Battery Park around 4 p.m. Local 639, the incumbent union, intended to meet with employees inside a tent in Battery Park, one of the Employer's work locations, before the employees' shift ended at 4:45 p.m. Local 32BJ planned to meet with employees after work in a public space in Battery Park. Tr. 20. While FCGOA had not organized a meeting, its agents also wanted to speak with unit members. Tr. 42-45.

After arriving at Battery Park, Local 32BJ's Carter explained to FCGOA's James that Local 32BJ would be meeting with employees, and he requested that James refrain from interfering with the meeting. James responded with the use of profanity. He then stated that he had more right to speak with the employees than Carter, since Local 32BJ was not a party to the election, but that he would refrain from interfering if Carter would call one of his superiors to speak with James. Tr. 46-47, 58, 87, 106; Petitioner's Exhibit 4, para. 2. Carter promptly called his supervisor, Juan Ospina, and asked that he come to Battery Park to speak with James. Tr. 87.

At 4:45 p.m., 13 employees, including Petitioner, went to the Local 32BJ meeting. Tr. 62-64, 92, 94; Petitioner's Exhibits 1, 3. Other employees went directly home. Tr. 20. FCGOA's representatives attempted to speak to the employees as they walked to the meeting. Petitioner's Exhibit 4, para. 3. In particular, James spoke loudly and aggressively, calling Julia Odle a liar and speaking disparagingly of Local 32BJ. Tr. 62, 88, 96-97. The agents of both Local 639 and FCGOA followed the employees to Local 32BJ's meeting.

At the meeting, Carter explained to the 13 employees that the purpose of the meeting was to take a group photograph and for the employees to sign forms giving Local 32BJ consent to use the photograph in its literature. All the employees proceeded to sign consent forms. Tr. 63, 88. While Carter was discussing the photograph and consent forms, James interrupted and stated to

the employees that Local 32BJ could not guarantee them a contract. Carter brushed James' remark aside and continued speaking to the employees. Petitioner's exhibit 4, para. 5; Tr. 50-51, 108. The employees then lined up for a group photograph holding a banner that indicated their opposition to both Local 639 and FCGOA. At this point, Local 639's Brennan took out a camera and attempted to take a picture of the group. The employees yelled at Brennan not to take their photograph, and he put his camera away. Tr. 16-17, 63, 88-89. While Brennan's photo attempt was being denied, Local 639's Fajardo took out his camera and photographed the group. Tr. 16-17; Petitioner's Exhibit 1. Carter then took his photograph of the 13 employees. Tr. 92; Petitioner's Exhibit 3.

After Carter took the employees' photograph, the meeting was over. The employees, except for Petitioner, left the meeting location. Tr. 24-25, 70, 84, 89, 94, 99. Odle stayed behind and helped Local 32BJ's Katie Miles pack up the banner and count and review the consent forms. Tr. 64, 69, 89. Carter likewise packed his away his camera. Tr. 89.

A few minutes after the meeting had concluded, and after all of the 13 employees except Odle had dispersed, Carter walked over to James, who was standing with Ospina, Carter's supervisor, and the other FCGOA and Local 639 agents. Tr. 100-101. Carter was upset that James had heckled and attempted to intimidate Odle and other employees prior to the meeting, and he believed that James had gone back on his word not to interfere with the meeting. Tr. 89-90. Carter used profanity and declared that James was not a man of his word. James responded in kind with his own profanity and disparaging remarks towards Carter. Although the language used by the two men was vulgar and provocative, there was no violence and no real threat of violence. Tr. 69-70, 89-91. Ospina intervened by telling Carter, "Just drop it. It isn't worth it.

Let's forget about it and go on." Tr. 70, 91. At this point, Carter, Odle, and Miles retrieved their belongings and left the meeting location. Tr. 70, 91. James and the other Local 639 and FCGOA agents remained at the meeting location talking for a few minutes.

ARGUMENT

As Alvin Carter's Conduct Was A One-Time Emotional Response Directed At Guy James And Not At An Employee, The Incident Took Place In The Presence Of Only One Employee, And News Of Carter's Conduct Was Not At All Disseminated To Other Unit Members, The ALJ Properly Decided Not To Set Aside The Landslide Election Results.

It is well settled that representation elections are not lightly set aside. There is a strong presumption that ballots cast express employees' true desires. Accordingly, the burden of proof placed on a party seeking to set aside an election is a heavy one. *Delta Brands, Inc.*, 344 NLRB 252, 252-253 (2005).

Although it had a rooting interest, Local 32BJ was neither a party to the election nor a participant in the RD case that led to the election. The conduct of Carter must therefore be evaluated as that of a third party.³ As set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803

³ The ALJ improperly applied the wrong legal standard, as he evaluated Carter's conduct under the less stringent standard applied to party agents. The use of this incorrect standard, which was beneficial to the objecting unions and disadvantageous to Petitioner, did not impact the outcome of this case, as the objections are without merit under either standard. It should be noted, however, that there is no legal or factual basis for the ALJ's finding that Carter was an agent of Petitioner. First, there is no evidence that Odle authorized Carter to perform the act(s) in question. Similarly, although Odle, like many of her fellow employees, communicated with Local 32BJ prior to filing the decertification petition, and supported organizing with Local 32BJ during the election campaign, there is no evidence that Odle acted on behalf of Local 32BJ when she petitioned to decertify Local 639. In fact, in its petition to revoke Petitioner's subpoena

(1984), third party acts can be the basis for setting aside election results only where the misconduct was so aggravated that it created a general atmosphere of fear and reprisal rendering a free election impossible. *Phoenix Mechanical, Inc.*, 303 NLRB 888, 888 (1991); *Cal-West Periodicals*, 300 NLRB 599, 600 (2000). The Board considers the following factors in assessing the seriousness of a third party threat: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was rejuvenated at or near the time of the election. *Lamar Company*, 340 NLRB 979, 980 (2003), citing *Westwood Horizons Hotel*, 270 NLRB at 803.

Assessing the first *Westwood Horizons* factor, the incident at issue did not involve a real threat of violence. Rather, both Carter and James used profanity and other vulgar and disparaging language. Although the ALJ considered it “probable” that Carter threatened James, he accurately noted that the two union officials were engaged in the type of verbal altercation common in the heat of contested elections. For example, in *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984) the Court upheld the Board's overruling of objections based on the stoning of an anti-union employee's house and a statement by a third party union supporter that

duces tecum, FCGOA affirmed that Local 32BJ played no role in the filing of the decertification petition. Board Exhibit 1. Moreover, the evidence shows that Odle and her fellow employees considered several different unions to replace Local 639. When she filed the petition, Odle presented the Board agent with the names of three different unions (including Local 32BJ) that she and her co-workers were considering. Tr. 72-78. Even after filing the petition, Odle and her co-workers considered yet another option, namely that of forming an independent, ‘in-house’ union or association comprised only of security officers employed by the Employer. Tr. 79-80.

"your name is being mentioned by everyone on the street, and your co-workers aren't going to be the same with you as before", and reasoning that a certain measure of bad feeling and hostile behavior is inevitable in any hotly contested election. Similarly in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58, 61 (1966), the Supreme Court noted that "representation campaigns are frequently characterized by bitter and extreme charges ... [and] vituperations"), and noted with approval that "the Board tolerates intemperate ... statements made by the union during attempts to organize employees."

Even crediting the testimony of FCGOA's Dippolito that Carter, in addition to using profanity, yelled to James, "I'll bust you up", the objections are not meritorious. Tr. 111. The Board has held that similar expressions, such as "I'm going to kick your ass", do not convey an actual threat of physical harm. *Leasco, Inc.*, 289 NLRB 549, 549, n. 2 (1988). As the ALJ in *Leasco* pointed out, this expression is a "profane colloquialism used commonly to verbalize the speaker's desire to prevail over another person." *Id.* at 552. Similarly, in *Lamar Company*, 340 NLRB at 980, 981, the Board overruled objections to an election where third parties threatened to kick an employee's ass if he did not vote for the union. Likewise, in *Laborers' Local No. 496 (Newport News of Ohio, Inc.)*, 258 NLRB 1105 (1981), the Board found that a union officer's threat to "punch [the charging party's] mealy mouth" did not violate Section 8(b)(1)(A) where the words were nothing more than an expression of anger. *Id.* at 1105, n.2 and 1106. *See also Cal-West Periodicals*, 330 NLRB at 600, citing *NLRB v. Hood Furniture Mfg.*, 941 F.2d 325 (5th Cir. 1991) (in an election decided by one vote, the Board properly overruled an objection based on a pro-union handbiller reacting to an employee's refusal to take a leaflet by calling the employee an obscene name, telling him he'd "better vote yes", and swatting his car).

Evaluating the second *Westwood Horizons* factor, even if Carter did threaten James with actual physical violence, the threat was directed only at James, and did not encompass even a single member of the voting unit. In *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1093 (1999), the Board, contrary to the hearing officer's recommendation, overruled an objection based on threats of physical and other harm because the employees subject to the threats were members of a different unit. Here, notably, Carter's words were directed at no employee, but only at FCGOA's James, and not even at Dippolito, Fajardo, and Brennan, all of whom remained after the meeting concluded. In this regard, Carter's comments were precisely an emotional reaction that resulted from personal animosity and provocation, rather than a reflection of hostility toward any conduct protected by the Act. Considering all of the circumstances, any employee who witnessed the incident would have reasonably viewed Carter's conduct as a display of personal frustration and anger towards James, rather than a direct response to employee Section 7 conduct. See *Plumbers Local No. 38 (Bechtel Corp.)*, 306 NLRB 511, 518 (1992); *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159, n. 29 (1997).

Moreover, as the ALJ correctly found, Petitioner Odle was the only unit employee to witness the exchange between Carter and James. Carter and Odle's testimony that 12 of the 13 employees had already departed from the meeting area was properly credited by the ALJ over James' testimony that the employees were still in the vicinity. First, the testimony of Local 639's Fajardo corroborates that of Carter and Odle and contradicts that of James. Fajardo testified that Odle was the only employee who remained in the meeting area. Tr. 24-25.

Similarly, the testimony of FCGOA's Dippolito contradicts that of James, FCGOA's president. Dippolito testified that most employees had left the area, and that only a couple of

employees remained. Tr. 110. As the ALJ properly highlighted, in Dippolito's Board affidavit, which he re-adopted at the hearing, Dippolito testified that only two employees were present at the start of the incident between Carter and James, and that they left at some point during the confrontation. Tr. 113-114; Petitioner's Exhibit 4, para. 7.

Assessing the third *Westwood Horizons* factor, the objecting parties produced no evidence that news of the incident was disseminated to employees. The Board does not presume dissemination, even where plant closure threats or other highly coercive statements are made directly to employees. *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004); *Antioch Rock & Ready Mix*, 327 NLRB at 1092 (objection overruled where threats were not disseminated in voting unit).

Applying the fourth *Westwood Horizons* factor, even assuming *arguendo* that Carter threatened James with physical violence, no employee could reasonably believe that he was capable of carrying out such violence towards James. First, Carter's supervisor was present; he intervened and persuaded Carter that it was not productive to further engage James. Second, James was not alone; he was accompanied by Dippolito, Fajardo, and Brennan. Third, the incident took place on a summer afternoon in a crowded public park. Fourth, after supervisor Ospina intervened, Carter walked away from James, and did not return to where James remained calmly chatting with Dippolito, Fajardo, and Brennan. Finally, aside from whether Carter was capable of carrying out any threat, it is impossible that employees acted in fear of Carter's capability of carrying out a threat. As the ALJ noted, only Odle witnessed Carter's conduct, news of which was not disseminated to any other unit employee.

Evaluating the fifth *Westwood Horizons* factor, even if Carter threatened James with actual physical violence, it was a single threat, made well in advance of the election, away from

the workplace, and was never rejuvenated.

Finally, the burden of proof on objecting parties is particularly heavy where the margin of victory is significant. *Avis-Rent-A-Car System*, 280 NLRB 580, 581, 582 (1986). Here, as the ALJ properly noted, the election resulted in a landslide vote against both unions (a margin of 51-0-17, with only one challenged ballot).

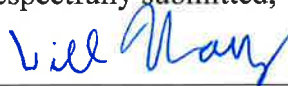
Under these circumstances, the objecting unions fell well short of meeting their burden to prove that Carter's conduct was so aggravated that it created a general atmosphere of fear and reprisal rendering a free election impossible.⁴

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Board overrule all of Local 639's exceptions and issue the appropriate Certification of Results.

Dated: New York, New York
October 26, 2010

Respectfully submitted,



William S. Massey

GLADSTEIN, REIF & MEGINNISS, LLP
817 Broadway, 6th Floor
New York, NY 10003

Attorneys for Petitioner Julia Odle

⁴ For all of the reasons discussed above, even under the less stringent standard for evaluating the misconduct of a party agent, the ALJ properly concluded that the objecting parties failed to prove that Carter's conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." See *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

CERTIFICATION OF SERVICE

The undersigned certifies that on this 26th day of October, 2010, the foregoing Petitioner's Answering Brief Opposing Local 639's Exceptions to the ALJ's Decision on Objections is being electronically filed with the Executive Secretary of the National Labor Relations Board. Copies of this brief have been served today via email on counsel for all other parties, as follows:

Matthew P. Rocco, Esq.

matt.rmglaw@verizon.net

Jason R. Laks, Esq.

jason.rmglaw@verizon.net

Paul D. Sirignano, Esq.

psirignano@chnnb.com

Celeste J. Mattina, Regional Director

celeste.mattina@nrlb.gov



William S. Massey